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No. 88-1644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

LDB CORPORATION,
Petitioner,
v.
GIBRALTAR SAVINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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In our petition, we showed how the court below revised the judgment for respondent by supplementing the jury's factual finding on which the judgment of fraud liability was based, and by modifying both the theory and the amount of the jury's fraud damage award—all in violation of petitioner's Seventh Amendment right to trial by jury. Respondent offers a number of opposing arguments.[1] In doing so, however, it provides confirma-

[1] Among respondent's arguments that review is unnecessary are the erroneous assertions that the court below merely affirmed and did not re-examine the jury verdict, Br. 5-6, and that it could have affirmed without opinion and thus should not be held accountable for whatever flaws are apparent in its decision. Br. 6. In the context of the present case, respondent thus asserts that an appellate court whose bottom-line conclusion on liability is the same as the jury's, and whose damage award is no larger than that of the jury,

tion that the court of appeals has seriously exceeded the limits on proper appellate court review, and has done this in a manner likely to mislead other courts if not corrected.

I

Respondent asserts repeatedly that the special interrogatory on which fraud liability depends—that the business of BI and BDI was "on-going and successful in scope"—is broad enough to include the further finding that petitioner promised to maintain the companies as on-going subsidiaries and provide financial support for them until the loan was repaid. Br. 10, 13, 14. Thus, respondent argues, the court of appeals merely upheld the verdict as returned by the jury, and did not rely on its own independent findings of fact.

This is not a reasonable reading of the jury finding. The representation as set forth in the interrogatory is simply a statement of present condition. It says nothing about any commitment or promise of support in the future and cannot reasonably be so understood. Respondent might have hoped that such support would be forthcoming, and the court of appeals cited evidence that petitioner in fact gave assurance that it would be.[2] But the statement found by the jury as a basis for fraud liability does not address that issue one way or the other. Indeed, the court of appeals conceded as much when it stated that "a representation regarding the 'on-going'

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is free to go beyond the jury's factual findings and to arrive at its own figure based on a theory different from the one submitted to the jury. Such an approach makes a mockery of the right to have the dispositive facts found by a jury in the first instance.

[2] Neither the loan contract nor any other written agreement contained any guaranty of payment or assurance of continued support by LDB Corporation. The suggestion by the court of appeals that oral assurances on behalf of petitioner could suffice to support the present action raises serious questions under the Texas statute of frauds. Tex. Bus. & Com. Code Ann. § 26.01(b)(6) (Vernon 1987).

nature of subsidiaries which a parent corporation is selling to the subsidiaries' officers [as here] would not necessarily be false . . . ." Pet. App. 56a.

It is no act of deference for the court of appeals to deprive the words of the jury's finding of their natural and apparent meaning in order to uphold the ultimate conclusion of liability. Instead, the court of appeals was obligated to review the sufficiency of the verdict in the terms in which it was entered, and thus determine whether the representation that BI and BDI were ongoing and successful—apart from any promise of future support by petitioner—was sufficient to sustain the fraud verdict.[3] We seek this Court's intervention in part to require that this be done.

II

With regard to the issue of damages, respondent suggests that what the court of appeals did here is consistent with the regular practice of the appellate courts and is no cause for alarm. Yet respondent is frank to acknowledge that the court of appeals instructed the district court "simply to revise the judgment to conform to the uncontested evidence." Br. 17. It notes that "the jury could not have returned any verdict less than $5.0 Million plus the approximately $787,000.00 [in interest]." Br. 14-15. If it were in fact the case that a jury could not reasonably reach any other verdict, then the standard for a directed verdict or a judgment notwithstanding the verdict would be met. But the court of appeals made no such finding, and in fact did not manifest any awareness that such a standard was applicable. It

[3] Respondent suggests that we are somehow barred from making this argument because we did not object to the special interrogatory on which liability rests. Br. 9. However, we have at no point suggested that that interrogatory was prejudicial or, for any other reason, should not have been submitted to the jury. We have only asserted a right to have the court of appeals determine whether the finding actually made by the jury sufficiently supports the conclusion of fraud liability.

should be required to take those steps if it really finds grounds to direct a verdict other than that returned by the jury.

III

Respondent also contends that the court of appeals did not find error in the jury instruction on calculating damages under the fraud theory, but only rejected "LDB's theory" that Gibraltar had to prove the value of guaranties received in security for the loan. Br. 4. The jury instruction provided, however, that the "measure of common law fraud damages is the difference between the value of what Gibraltar parted with and the value of what it received *on the date the loan was funded*." Pet. 16 n.18 (emphasis added). The court of appeals answered petitioner's assertion that respondent failed to establish the value of the property received by stating that "the straight loan of money without expectation of participating in the profits of the venture, as here, does not implicate the out-of-pocket limit on damages appropriate in actions under the securities laws." Pet. App. 62a. This statement is flatly inconsistent with the fraud instruction on which the jury's damage award was based.

IV

Analogizing this case to several where courts of appeals have entered remittiturs, Br. 17-18, respondent argues that there is nothing unprecedented about what the court of appeals did here. Of course, the court did not indicate that it was ordering a remittitur. Nor did it follow the accepted practice of entering an order for new trial under Federal Rule of Civil Procedure 59, to be vacated upon the plaintiff's acceptance of a reduced verdict. 6A Moore's Federal Practice ¶ 59.08[7], at 59-187-59-188 (1987). *E.g.*, *Harper* v. *Zapata Off-Shore Co.*, 741 F.2d 87, 93 (5th Cir. 1984); *Carlton* v. *H.C. Price Co.*, 640 F.2d 573, 582 (5th Cir. 1981). The court of

appeals did not enter a remittitur. It simply altered a damage verdict which it believed to be incorrect.

Furthermore, respondent offers no precedent for invocation of the remittitur procedure where the court of appeals concludes that the jury has been incorrectly instructed on the issue of damages. Remittitur is proper only where the jury was properly instructed but its award was excessive. When the jury has been improperly instructed, remand is required.

CONCLUSION

The decision below is a case study of the ways in which appellate courts, whether by design or inattention, can eviscerate and supersede the right to trial by jury. This Court's review is necessary in order to reestablish the proposition that appellate courts sit to review jury verdicts, not to rewrite them.

Respectfully submitted,

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